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In The
Supreme Court of the United States

FASHION VALLEY MALL, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432.M,

Real Party In Interest.

On Petition For Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the California Supreme Court's failure to consider Petitioner's property rights, and failure to consider this Court's "public forum doctrine" in balancing free speech and property rights, when it expanded the scope of the public easement to "speak" effectively dedicated in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979)[1] to include speech calculated to interfere with a privately owned shopping center's commercial functions result in an improper taking under the Fifth Amendment of the United States Constitution?

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[1] To avoid confusion between the California Supreme Court's decision and this Court's decision, Petitioner will refer to the California Supreme Court's decision as "*Robins*," and to this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) as "*PruneYard*."

CORPORATE DISCLOSURE STATEMENT

Fashion Valley Mall, LLC, a Delaware limited liability company, is the current owner of the Fashion Valley Shopping Center and is the successor-in-interest to the Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center.

Fashion Valley MM, LLC, a Delaware limited liability company, owns Fashion Valley Mall, LLC.

Simon Property Group, L.P., a Delaware limited partnership, owns 50% of Fashion Valley MM, LLC. Simon Property Group. Inc., a Delaware corporation, which is publicly traded on the New York Stock Exchange, is the general partner of Simon Property Group, L.P.

PPF RTL 352 Fashion Valley, LLC a Delaware limited liability company, owns 49.9% of Fashion Valley MM, LLC.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
1. The Trial Proceedings	6
2. The Decision of the National Labor Relations Board	7
3. The Opinion of the U.S. District Court of Appeals	8
4. The Opinion of the California Supreme Court	8
SUMMARY OF ARGUMENT	13
ARGUMENT	15
CONCLUSION	26
APPENDIX	
Decision of the California Supreme Court, December 24, 2007	App. 1
Denial of Petition for Rehearing by the California Supreme Court, February 20, 2008	App. 54

TABLE OF AUTHORITIES

Page

CASES

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 2

Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985) 2, 13, 16

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... *passim*

Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal.4th 850 (2007) ..... *passim*

Fashion Valley Mall, LLC v. N.L.R.B., 451 F.3d 241 (D.C. Cir. 2006) 1, 8

H-CHH Associates v. Citizens for Representative Government, 193 Cal.App.3d 1193 (1987) 9, 10, 22

Lingle v. Chevon U.S.A. Inc., 544 U.S. 528 (2005) 19, 22, 24

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983) 2, 13, 16, 17

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) ..... *passim*

Robins v. Pruneyard Shopping Center, 23 Cal.3d 899 (1979) ..... *passim*

Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal.2d 766 (1964) 5

TABLE OF AUTHORITIES – Continued

Page

Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.), 56 Cal.App.4th 996 (1997).....22

CONSTITUTIONAL PROVISIONS

Article I, section 2, subdivision (a) of the California Constitution.....3

First Amendment of the United States Constitution 2, 10, 15

Fifth Amendment of the United States Constitution ..... i, 2, 15, 24

Fourteenth Amendment of the United States Constitution 2

STATUTES

28 U.S.C. § 1257(a).....1

Section 552.1 of the California Penal Code 5

PETITION FOR A WRIT OF CERTIORARI

Fashion Valley Mall, LLC, respectfully petitions for a writ of certiorari to review the opinion and judgment of the California Supreme Court.

OPINIONS BELOW

Responding to a request by the U.S. Circuit Court of Appeals for the District of Columbia to consider a question of California constitutional law, the California Supreme Court published its opinion at *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007). The California Supreme Court filed a one-page order denying Petitioner's Petition for Rehearing on February 20, 2008.

The U.S. Circuit Court of Appeals for the District of Columbia published its opinion and requested that the California Supreme Court consider a question of law at *Fashion Valley Mall, LLC v. N.L.R.B.*, 451 F.3d 241 (D.C. Cir. 2006).

JURISDICTION

The California Supreme Court issued its opinion on December 24, 2007, and denied Petitioner's timely Petition for Rehearing on February 20, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

This Court has held that it has jurisdiction to consider an issue raised in a petition for rehearing.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975). Petitioner, in its January 8, 2008, Petition for Rehearing, asked the California Supreme Court to consider the Fifth Amendment issues raised by the manner in which it answered the question certified by the U.S. Circuit Court of Appeals for the District of Columbia.

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment,[2] provides: "[N]or shall private property be taken for public use, without just compensation."

The First Amendment of the United States Constitution as interpreted by this Court in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) and *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2] *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, (1897).

Article I, section 2, subdivision (a) of the California Constitution as interpreted by the California Supreme Court in *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007) and *Robins v. Pruneyard Shopping Center, supra*. Article I, section 2, subdivision (a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

STATEMENT OF THE CASE

On October 3, 1998, the Graphics Communications International Union ("Union") used the Fashion Valley shopping center as a forum for public communication ("public forum"[3]) without submitting an application for a permit. Petitioner's predecessor-in-interest asked the Union to stop using the shopping center as a public forum because the Union had not submitted an application for a permit, not because the Union was violating any substantive rule regulating the use of the shopping center as a public forum.

[3] Petitioner is not using the term "public forum" as a collective description for a "traditional" and "designated" public form as opposed to a "non-public" forum. Rather, the term simply refers to the speaker's use of any property as a forum to communicate with members of the public.

The Union's demonstration precipitated a review of the use by Petitioner's predecessor-in-interest of an application and permit procedure and several substantive rules by a National Labor Relations Board ("NLRB") Administrative Law Judge. The NLRB, however, eventually focused its decision on a single substantive rule, a boycott prohibition, even though the Union was not asking shoppers to boycott any one of the Fashion Valley stores, and, had the Union submitted an application, the reviewed boycott prohibition would not have prevented the Union from getting a permit to distribute the leaflets the Union was using. The distributed leaflets, in addition to disclosing the existence of a labor dispute with the San Diego Union-Tribune Publishing Co. and the fact that the Robinsons-May department store advertised in the San Diego Union-Tribune, only asked shoppers and the employees of the Robinsons-May department store to call the CEO of the San Diego Union-Tribune Publishing Co.

Nothing in the shopping center's regulations, including the boycott prohibition, caused the Union to refrain from asking shoppers to boycott the Robinsons-May department store. The Union representative who organized the demonstration testified at trial that he did not apply for a permit because he did not know the shopping center regulated the use of its property with an application and permit procedure.

On October 15, 1998, the Union filed a "Charge Against Employer" with the NLRB. The Union claimed that its right to leaflet on the shopping center

without submitting an application was protected by Section 552.1 of the California Penal Code as interpreted by *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964).

On or about September 30, 1999, the NLRB filed a complaint against Petitioner's predecessor-in-interest charging it with having engaged in unfair labor practices. The complaint alleged that the Union was distributing handbills to members of the public in front of the Robinsons-May department store. The complaint alleged that these handbills communicated information about a labor dispute with the San Diego Union-Tribune Publishing Co., and informed members of the public that one of the Robinsons-May department stores advertised in the San Diego Union-Tribune. The complaint alleged that Petitioner's predecessor-in-interest was using an application and permit procedure which improperly: (1) required an application to be submitted before using the shopping center as a public forum, (2) required the owner's approval of the application, (3) [even though the complaint did not allege that the Union was asking shoppers to boycott the Robinsons-May department store[4]] required the disclosure of an intent to discourage customers from shopping at a store in the shopping center and

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[4] As noted above, the distributed handbill only asked shoppers and the employees of the Robinsons-May department store to call executives at the Robinsons-May department store and the San Diego Union-Tribune Publishing Co.

prohibited urging customers to refrain from shopping at a store in the shopping center, (4) required the identification of the participants, and (5) failed to assure that the information provided will be kept confidential.

1. The Trial Proceedings

On October 10, 2000, NLRB Administrative Law Judge William L. Schmidt ("ALJ Schmidt") presided over the trial of the unfair labor complaint filed by the NLRB.

On September 26, 2001, ALJ Schmidt issued his decision.[5] ALJ Schmidt held that the California Constitution did not define a labor union's right to use private property as a public forum. ALJ Schmidt held that California real property law, not California constitutional law, controlled labor unions' rights to use private property as a public forum. Relying solely on an argument submitted by the Union's counsel, and ignoring the leaflet and the testimony, ALJ Schmidt also found that the Union was attempting to persuade shoppers to boycott the Robinsons-May department store.

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[5] See *Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center and Graphic Communications International Union, Local 432M, AFL-CIO*, 343 NLRB 441 (2001).

2. The Decision of the National Labor Relations Board.

On December 20, 2001, the NLRB had used the same interpretation of California real property law to find that another union had the right to demonstrate in front of a free-standing retail store.[6] – *Waremart Foods*, 337 NLRB 41 (2001). On January 16, 2004, the U.S. Circuit Court of Appeals for the District of Columbia rejected this interpretation of California real property law – *Waremart Foods v. N.L.R.B.*, 354 F.3d 870 (D.C. Cir 2004). The D.C. Circuit Court found that the California constitution as interpreted by *Robins*, controlled any speaker's right to use private property as a public forum. The D.C. Circuit Court also found that the NLRB reading of California real property law which freed labor speech from the constitutional restrictions on the use of private property as a public forum have been unconstitutional.

On October 29, 2004, the NLRB issued its decision – *Equitable Life Assurance Society, etc.*, 343 NLRB 438 (2004). Having lost in *Waremart Foods* the argument that California constitutional law did not define a labor union's right to use private property as a public forum, the NLRB looked at the California Constitution and concluded that a boycott prohibition was an unconstitutional content-based regulation of speech. The NLRB issued an order preventing Petitioner from

[6] *Robins* had extended the California constitutional protection of speech to shopping centers.

using the reviewed boycott prohibition, as well as any other boycott prohibition.

3. The Opinion of the U.S. District Court of Appeals.

On June 16, 2006, the D.C. Circuit Court issued its opinion and request that the California Supreme Court considered a question in this matter – *Fashion Valley Mall, LLC, supra*. The D.C. Circuit Court reversed ALJ Schmidt's finding that the Union had asked shoppers to boycott a store in the shopping center. And, the D.C. Circuit Court gave the California Supreme Court the opportunity to resolve an undecided issue of California constitutional law – whether a private property owner had the power, under the California constitutional protection of speech, to prevent speakers from using its shopping center as a public forum for asking shoppers to boycott one or more of the stores in the shopping center.

4. The Opinion of the California Supreme Court.

On August 16, 2006, the California Supreme Court granted the request of the D.C. Circuit Court to consider a question of law presented in the matter pending for the D.C. Circuit Court.

Petitioner submitted the same arguments in support of a boycott prohibition to both the D.C. Circuit Court and the California Supreme Court.

Petitioner relied heavily on the California Second District Court of Appeal's holding in *H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193 (1987) that a shopping center owner had the power to prohibit speech which would economically interfere with the businesses of the shopping center's stores. *H-CHH Associates* held that the shopping center owner had the power to prevent competition with the business of the shopping center's stores resulting from requests for the shoppers' funds. Petitioner argued that, if a shopping center owner had the power to prevent the incidental and mild economic interference which could be caused by taking a few dollars out of shoppers' pockets, a shopping center had the power to prevent the intended and more drastic economic interference which would be caused by shoppers not shopping at one or more of the shopping center's stores.

The majority opinion in *H-CHH Associates* gave shopping centers the power to protect stores from economic interference without discussing or applying this Court's "public forum doctrine." Petitioner, therefore, argued that this power could be justified by either (1) putting privately owned shopping centers in the "non-public" forum category, (2) not using the literal definition of content neutrality, or (3) using the *H-CHH Associates* recognized substantial or compelling interest in preventing economic interference to justify the shopping center's use of a content-based regulation that was narrowly drawn and viewpoint-neutral.

On December 24, 2007, the California Supreme Court issued its decision – *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007). The California Supreme Court, in a deeply divided four-to-three decision, found that a boycott prohibition was a content-based regulation of speech and that privately owned shopping centers did not have the substantial or compelling interest in preventing economic interference needed to justify the use of a content-based regulation. The four-justice majority did not discuss, use or reject the use of this Court's "public forum doctrine." The majority applied the regulatory standard applicable, under this Court's "public forum doctrine," to a "traditional" or an owner-designated public forum without any discussion of public forum categories. Recognizing that the relevant holding in *H-CHH Associates*, even when applied to soliciting funds, was inconsistent with the majority's view of a privately owned shopping center's regulatory power, the majority reversed the relevant *H-CHH Associates* holding.

The three-justice minority explained why they would overrule *Robins, supra*. The minority would follow the U.S. Supreme Court's interpretation of the scope of the First Amendment as well as the rejection, or substantial limitation, by all (i.e., 21) but one of the states which have been asked to adopt a *Robins* extension of state constitutional protection of speech

to private property.[7] Even if *Robins* were not overruled, the three-justice minority would permit shopping center owners to prohibit speech that contravened the property's existence. The three-justice minority pointed out that the speech protected in *Robins* was compatible with the normal use of the shopping center. In contrast, urging a boycott contradicts the purpose of the shopping center's existence.

On January 8, 2008, Petitioner filed a Petition for Rehearing requesting that the California Supreme Court consider the U.S. Constitutional issues raised by the manner in which the majority had answered the question certified by the D.C. Circuit Court. This Court, in its review of *Robins*, found that what Mr. Robins and his classmates were "saying" and doing presented no risk of interference with normal business operations. *PruneYard, supra,* at 77, 83. In deed, this Court noted that the California Supreme Court

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[7] *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850, 874-878 (2007). Arizona, Connecticut, Georgia, Hawai'i, Iowa, Michigan, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, and Wisconsin, have "rejected" the *Robins* approach. Illinois, Nebraska, and Nevada have cited but declined to follow *Robins*. Washington has "very narrowly confined" its state constitutional protection of speech. Massachusetts' state constitutional protection of speech has always been limited to gathering the signatures political candidates need to get on the ballot. Colorado has recently permitted shopping centers to adopt "substantial restraints on the exercise of free speech." Only New Jersey continues to use a *Robins*-like state constitutional protection of speech on privately owned shopping centers.

had given the shopping center owner the power to adopt regulations to assure that the use of the shopping center as a public forum did not interfere with normal business operations. *PruneYard, supra,* 447 U.S. at 78 and 84 (1980).

In the Petition for Rehearing, Petitioner also asked the California Supreme Court to address the "public forum doctrine" issues Petitioner had raised after it had determined whether California would adopt this Court's "public forum doctrine" in *San Leandro Teachers Association v. San Leandro Governing Board.* On August 28, 2007, which was after all briefs had been filed, the California First District Court of Appeal held that California had adopted this Court's "public forum doctrine." On November 28, 2007, which was after oral argument, the California Supreme Court granted a petition for review of the First District Court of Appeal's decision.

Under this Court's "public forum doctrine" the government agency in control of public property dedicated to nonpublic forum purposes can use content-based regulations of speech – the regulation need only be a viewpoint-neutral, reasonable attempt to prohibit speech incompatible with the dedicated non-public forum uses of public property. If the California Supreme Court approved the adoption of this Court's "public forum doctrine," Petitioner submitted that private property owners must be given the same power to protect their primary nonpublic forum uses of the shopping center.

On February 20, 2008, the same four-justice majority of the California Supreme Court voted to deny Petitioner's Petition for Rehearing. The same three-justice minority voted to grant this Petition.

SUMMARY OF ARGUMENT

This Court, since it decided *PruneYard* in 1980, has limited the government's authority to force private property owners into allowing the general public to use their property in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). The California Supreme Court's decision ignored Petitioner's property rights and failed to consider the effect of *Nollan* and *Dolan.* The greater protection now provided by these cases for private property rights requires this Court to reconsider its view of the role of the Takings Clause in the government's preventing a privately owned shopping center from excluding speech intended to interfere with the shopping center's commercial function.

This Court, since it decided *PruneYard* in 1980, has also articulated and applied a "public forum doctrine" to determine when and how the government may regulate or exclude speech and free speech activities on public property in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.,* 473 U.S. 788 (1985) and *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37 (1983). On the public

property which the government has been required by long tradition to hold open for public assembly and general debate, as well as any public property the government has voluntarily opened for the same, this Court's "public forum doctrine" prohibits the government from using a content-based regulation of speech and free speech activities without a substantial or compelling interest for the use of such regulations. The regulation must also be narrowly tailored to protect a substantial or compelling interest. In contrast, on public property which the government has dedicated to nonpublic forum uses, this Court's "public forum doctrine" permits the use of content-based regulations to exclude speech and free speech activities incompatible with the primary dedicated uses of the property. The regulation need only be viewpoint-neutral and reasonably designed to preserve the primary dedicated uses of the property.

The California Supreme Court's decision in *Fashion Valley Mall* ignored the obvious functional differences between the public property this Court has placed in the "traditional" or "quintessential" public forum category and a privately owned shopping center. The California Supreme Court's decision also ignored the obvious functional similarities between the property this Court has placed in the "nonpublic" forum category and a privately owned shopping center. The greater protection of property rights now provided by *Nollan* and *Dolan* requires this Court to consider the role of this Court's "public

forum doctrine" in applying the *Nollan* and *Dolan* requirements.

ARGUMENT

Petitioner is not asking this Court to reconsider its decision in *PruneYard*. The free speech activity is different in the case at bar. The scope of the public access easements effectively dedicated by *Robins* and *Fashion Valley Mall, supra,* dissenting opinion, are different. And, this Court has revisited and revised its interpretation and application of both the First and Fifth Amendments of the U.S. Constitutional law since it decided *PruneYard* in 1980.

The PruneYard Shopping Center objected to the loss of the right to exclude all uses of the shopping center as a public forum, including uses which would not interfere with the shopping center's commercial function. In contrast, Petitioner is objecting to the loss of the right to exclude the use of its property to deliver a message which "contradicts the very purpose of the shopping center's existence."[8]

The public access easement effectively dedicated in *Robins* sanctioned the exclusion of free speech activities which interfered with the shopping center's

[8] *Fashion Valley Mall LLC v. N.L.R.B.*, 42 Cal.4th 850, 870 (2007), dissenting opinion.

commercial function.[9] In contrast, the public access required by *Fashion Valley Mall* is the functional equivalent of a public access easement for speech which is intended to interfere with the shopping center's commercial function. *Fashion Valley Mall* prevents the exclusion of speech from the common areas of a privately owned shopping center calculated to keep shoppers from shopping in one or more of its stores apparently because the government does not have the power to exclude this message on that species of public property which this Court has identified as a "traditional" public forum or a "quintessential" public forum.

When the California Supreme Court decided *Robins* in 1979 and this Court decided *PruneYard* in 1980, this Court had not yet articulated its "public forum doctrine" as the means for determining when and how the government may regulate or exclude speech and free speech activities from public property. This Court first articulated its "public forum doctrine" in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985). This Court's "public forum doctrine" puts public property into one of three public forum categories and permits two significantly different standards for regulating or excluding speech and free speech activities.

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[9] *PruneYard*, *supra*, 447 U.S. at 78 and 84.

The first category is the "traditional" or "quintessential" public forum. This Court has placed public parks, sidewalks and streets in this public forum category. This category only includes public property which by long tradition has been devoted to public assembly and debate. This Court has also described a "traditional" or "quintessential" public forum as that public property which has "immemorially been held in trust for the use of the public, and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[10]

On the public property which the government is required to hold in trust for public assembly, communication, and debate, the government's power to regulate or exclude speech and free speech activities is severely limited. Unless justified by the protection of a substantial or compelling interest, the regulation must be content-neutral. The regulation must also be narrowly drawn to protect a substantial or compelling interest. The reason for such a strict standard of regulation or exclusion is that one of the principal purposes of this property is to give the public a forum for the free exchange of ideas.

The second category includes public property the government has voluntarily opened to public assembly and general debate. When the government is not

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[10] *Perry Education Assn., supra,* at 45.

required to hold the property in trust for public assembly, etc., but voluntarily opens other public property for public assembly, etc., the government has the same severely limited power to exclude speech and free speech activities.

This Court has placed the public property which the government primarily developed, operates and maintains for other than public forum purposes in a third category – "nonpublic" forum. This Court has placed specific purpose public developments which are as generally opened to the public as any shopping center in this category – e.g., post offices and airport terminals.

Drawing an analogy to the fundamental right of private property owners to exclude entry, this Court has given the government the power to preserve the primary nonpublic forum uses to which it has dedicated public property. This Court has given the government the power to exclude incompatible uses, including incompatible speech and free speech activities. To avoid censorship, this Court has required the exclusion to be viewpoint-neutral and to be reasonably related to preserving of the government's primary uses of public property. If the government is making a reasonable, viewpoint-neutral attempt to exclude incompatible uses, the exclusion need not be content-neutral or narrowly tailored to protect a substantial or compelling government interest.

When this Court decided *PruneYard* it analyzed the PruneYard Shopping Center's takings argument

solely in terms of the economic impact of allowing opponents of a United Nations resolution against Zionism to solicit support for their opposition. *PruneYard, supra,* at 84 ("... appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state authorized limitation of it amounted to a 'taking.'"). However, this Court, since it decided *PruneYard*, has limited the government's power to dedicate public access easements.

In *Nollan, supra,* this Court held that a condition on a land use permit which required that the landowners give the general public the right to pass over a portion of their land was valid only to the extent that there was an essential nexus between the impact caused by the new development and the exaction demanded.

In *Dolan, supra,* at 374, this Court that held that a condition on a land use permit which required that the landowner dedicate land to the city for a bike path and also that portion of the land which fell within the 100 year flood plain of an adjacent river was valid only to the extent the city demonstrated (1) the dedication would mitigate the impacts caused by the development and (2) the amount of the exaction was roughly proportional to the impacts requiring the mitigation.

In *Lingle v. Chevon U.S.A. Inc.*, 544 U.S. 528, 545-548 (2005), this Court explained that *Nollan* and

Dolan had been decided on the basis that the government may not impose unconstitutional conditions on the exercise of the constitutional right to use private property, subject, of course, to reasonable regulation. *Nollan, supra*, at 833, n.2 (the ability to use private property is not a government benefit).

Taken together, *Nollan* and *Dolan's* stand for the proposition that the government may limit a private property owner's right to exclude the general public where the owner's use of its property has created an impact and the prohibition of the right to exclude can mitigate that impact. *PruneYard's* analysis, centered as it was on the economic impact of the presence of opponents of the United Nations, resolution, is no longer applicable because of its failure to consider the current state of takings jurisprudence.

This Court needs to consider the *Nollan* and *Dolan* limitations on the government's power to require the dedication of public access easements, or their functional equivalents, in light of the government's power to regulate or exclude speech and free speech activities under this Court's "public forum doctrine."

Robins identified the need for extending the state constitutional protection of speech to privately owned shopping centers as the increasing number of privately developed and maintained shopping centers and the decreasing number of publicly developed and maintained business districts incorporating what this Court has categorized as "traditional" or "quintessential"

public fora. *Robins* did not discuss the reasons for the relative increase in the number of privately owned and operated shopping centers.

As noted above, the public access requirement imposed by *Fashion Valley Mall* prevents the exclusion of speech that is incompatible with the primary function of a shopping center because the government does not have the power to exclude this message on that species of public property which this Court has identified as a "traditional public forum" or a "quintessential public forum." This analysis ignores the inescapable functional difference between a "traditional" or "quintessential" public forum and a shopping center.

One of the principle functions of the public property this Court has placed in the traditional or quintessential public forum category is to provide a place for the free exchange of ideas. In contrast, shopping centers were primarily developed for and are primarily dedicated to a nonpublic forum purpose. Even *Robins* recognized that the shopping center owners' invitation to the public is to shop at the stores in the respective shopping center, not to assemble, and publicly share information and debate public questions.[11] The dissenting opinion in *Fashion Valley Mall* observed that "[a] shopping center exists for the individual businesses on the premises to do business." The California Second District Court of Appeal described a

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[11] *Robins, supra*, at 902.

shopping center as a "center of commerce," and observed that the primary function of a shopping center is "to facilitate the ease of commerce and to promote the business of its merchant tenants."[12] A different Division of the California Second District Court of Appeal observed that the "original" and "certainly primary . . . function" of a shopping center is "as a place of commerce."[13]

Fashion Valley Mall's use of the regulatory standard applicable to public property which the government, by long tradition, is required to hold in trust for public assembly and debate ignores the economic significance of the difference between a private and public property, and ignores the rule that the Takings Clause prevents the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[14]

When the government issues a permit for the private development of a shopping center, the private property owner bears the entire financial burden of acquiring the land, designing and constructing the shopping center, and then operating and maintaining

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[12] *H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193, 1221 (1987).

[13] *Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.)*, 56 Cal.App.4th 996, 1017 (1997).

[14] *Lingle*, *supra*, at 537.

the shopping center development. In contrast, the government always bears the burden of operating and maintaining a public sidewalk or street, even if the government uses its permit process to require the developer to dedicate a portion of the development to a government agency for that purpose.

In addition to reducing public expenditures, permitting the private development of shopping centers generates tax revenue. Unlike public parks and sidewalks, private property generates property tax revenue. And, the amount of sales tax revenue generated by the concentration of retail businesses in an integrated shopping center development designed and operated to maximize sales makes shopping centers a proverbial "cash cow."

Applying the two-step analysis of the Takings Clause this Court articulated in *Dolan*, this Court first needs to approve or disapprove the effective dedication of a pubic access easement for free speech activities. Assuming that this Court approves the effective dedication of a public access easement for free speech activities, then this Court needs to determine whether the nature and scope of the public access easement effectively dedicated in *Fashion Valley Mall* is roughly proportional to the impact on free speech caused by the greater number of privately owned shopping centers without integrated public

parks or sidewalks.[15] That is, does the existence of a privately owned shopping center, as opposed to a publicly owned business district, create a need for the government to require public access for speech and speech activities that interfere with the shopping center's commercial functions?

Petitioner submits that loss of the power to protect the primary nonpublic function of the shopping center by excluding incompatible speech, or any incompatible activity, is a violation of the Takings Clause in the Fifth Amendment. As noted above, the Takings Clause prevents the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[16]

In conclusion, the public access easement effectively dedicated in *Fashion Valley Mall* violates the Takings Clause because it goes too far. In an effort to reverse a perceived reduction in the number of places where the public has an opportunity to publicly communicate information and debate opinions, *Robins* effectively dedicated a public access easement to "speak" on privately owned shopping centers. In *Fashion Valley Mall*, the California Supreme Court stretched the *Robins* dedicated easement to "speak" without interfering with normal business operations to an easement to "speak" with the intent to cause

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[15] *Lingle, supra*, at 546-547.

[16] *Lingle, supra*, at 537.

interference with normal business operations. While dedicating an easement to "speak" on all privately owned shopping centers will increase the number of places where the public can communicate information and debate opinions, preventing the private property owner from excluding speech calculated to cause interference with normal business operations will not. The dedication of a public access easement to "speak" with the intent to interfere with normal business operations also goes too far because it takes away from a private property owner the power this Court has given every government agency to protect the primary nonpublic forum function of public property under its control from incompatible speech and other free speech activities.

CONCLUSION

For all of the foregoing reasons, Petitioner submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF CALIFORNIA

FASHION VALLEY MALL, LLC, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent; GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432-M, Real Party in Interest.	S144753 D.C. Cir.Ct.App. No. 04-1411 (Filed Dec. 24, 2007)

We granted the request of the United States Court of Appeals for the District of Columbia Circuit to decide whether, under California law, a shopping mall may enforce a rule prohibiting persons from urging customers to boycott a store in the mall. For the reasons that follow, we hold that the right to free speech granted by article I, section 2 of the California Constitution includes the right to urge customers in a shopping mall to boycott one of the stores in the mall.

FACTS

On October 15, 1998, Graphic Communications International Union Local 432-M (Union) filed a charge before the National Labor Relations Board

(NLRB) alleging that the owners of the Fashion Valley Mall (Mall) in San Diego had "refused to permit employees of the Union-Tribune Publishing Company to leaflet in front of Robinsons-May" department store in the Mall. The NLRB issued a complaint and noticed a hearing, after which an administrative law judge ruled that the Mall had violated section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by barring the employees from distributing leaflets.[1]

The administrative law judge found that the Union "represents a unit of the pressroom employees at the San Diego Union-Tribune (Union-Tribune), a major general circulation newspaper in San Diego." The collective bargaining agreement between the employees and the newspaper had expired in 1992 and the parties had been unable to reach a new agreement. The administrative law judge thus found that a "primary labor dispute" existed between the newspaper and its employees at the time of the disputed labor activities in 1998.

On October 4, 1998, 30 to 40 Union members had distributed leaflets to customers entering and leaving

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[1] The National Labor Relations Act provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of certain rights, including "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining. . . ." (29 U.S.C. §§ 157, 158(a)(1) [barring interference with rights in § 157 (§ 7 of act)].)

the Robinsons-May store at the Mall.[2] The leaflets stated that Robinsons-May advertises in the Union-Tribune, described several ways that the newspaper allegedly treated its employees unfairly, and urged customers who believed "that employers should treat employees fairly" to call the newspaper's "CEO," listing his name and telephone number. The administrative law judge concluded: "From all indications, the leafleters conducted their activity in a courteous and peaceful manner without a disruption of any kind and without hindrance to customers entering or leaving" the store.

Within 15 or 20 minutes, Mall officials "arrived on the scene to stop the leafleting," notifying the Union members that they were trespassing because they had not obtained a permit from the Mall "to engage in expressive activity," and warning them that they "would be subject to civil litigation and/or arrest if they did not leave." A police officer appeared and, following a brief argument, the Union members moved to public property near the entrance to the Mall and continued distributing leaflets briefly before leaving the area.

The Mall has adopted rules requiring persons who desire to engage in expressive activity at the

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[2] In addition to Robinsons-May, the Fashion Valley Mall includes Nordstrom, Neiman Marcus, Saks Fifth Avenue, Macy's, and JC Penny department stores, as well as an 18-theater movie complex. The mall is surrounded by parking structures and lots.

Mall to apply for a permit five business days in advance. The applicant "must agree to abide by" the Mall's rules, including rule 5.6, which prohibits "impeding, competing or interfering with the business of one or more of the stores or merchants in the shopping center by: [¶] . . . [¶] 5.6.2 Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."

The administrative law judge found that the Union "was attempting to engage in a lawful consumer boycott of Robinsons-May because Robinsons-May advertised in the Union-Tribune newspaper" and further found "that it would have been utterly futile for the Union to have followed [the Mall]'s enormously burdensome application-permit process because its rules contained express provisions barring the very kind of lawful conduct the Union sought to undertake at the Mall." The administrative law judge thus ordered the Mall to cease and desist prohibiting access to the Union's "leafleters for the purpose of engaging in peaceful consumer boycott handbilling."

On September 26, 2001, the matter was transferred to the NLRB in Washington, D.C. On October 29, 2004, the NLRB issued an opinion affirming as modified the administrative law judge's decision. Citing our decision in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, affirmed *sub nomine PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, the NLRB stated: "California law permits the

exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. [Citations.] Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech 'urging or encouraging in any manner' customers to boycott one of the shopping center stores. . . . [I]t appears that the purpose and effect of this rule was to shield [the Mall]'s tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that [the Mall] violated Section 8(a)(1) by maintaining Rule 5.6.2. [Citation.]" (Fn. omitted.)

The Mall petitioned for review before the United States Court of Appeals for the District of Columbia Circuit, which issued an opinion on June 16, 2006. The court of appeals stated it had to resolve two issues: "(1) State law aside, did [the Mall]'s requirement of a permit for expressive activity, conditioned as it was upon the Union's agreement not to urge a boycott of any Mall tenant, violate § 8(a)(1) of the Act? (2) If so, was [the Mall] acting within its rights under California law?" The court answered the first question in the affirmative, which meant that the case turned on the resolution of the second question. The court addressed this question of California law as follows: "Although [the Mall] is correct that there is not substantial evidence the Union intended to boycott any of the Mall's tenants, nothing in the Act prohibits the Union from carrying out a secondary

boycott[3] by means of peaceful handbilling. [citation.] in subjecting the Union to a permit process that required it to forswear use of this lawful tactic, therefore, [the Mall] interfered with the employees' rights under § 7 of the Act. . . . Enforcement of Rule 5.6.2 therefore violated § 8(a)(1) – unless, that is, the Company had the right under California constitutional law to exclude the employees altogether." The court of appeals observed that "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant," and concluded that "whether [the Mall] violated § 8(a)(1) of the Act depends upon whether it could lawfully maintain and enforce an anti-boycott rule – a question no California court has resolved." Accordingly, the United States Court of Appeals for the District of Columbia Circuit filed in this court a request,[4] which we granted, to decide the following question: "Under California law may Fashion Valley maintain and enforce against the Union its Rule 5.6.2?"

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[3] A "secondary boycott" is "union activity directed against a neutral employer." (*NLRB v. Pipefitters* (1977) 429 U.S. 507, 534.)

[4] Rule 8.548(a) of the California Rules of Court, which replaced former rule 29.8(a), states: "On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if: [¶] (1) The decision could determine the outcome of a matter pending in the requesting court; and [¶] (2) There is no controlling precedent."

Discussion

Article I, section 2, subdivision (a) of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Nearly 30 years ago, in *Robins v. Pruneyard Shopping Center, supra,* 23 Cal.3d 899, 910 (*Pruneyard*), we held that this provision of our state Constitution grants broader rights to free expression than does the First Amendment to the United States Constitution by holding that a shopping mall is a public forum in which persons may exercise their right to free speech under the California Constitution. We stated that a shopping center "to which the public is invited can provide an essential and invaluable forum for exercising [free speech] rights." (*Ibid.*) We noted that in many cities the public areas of the shopping mall are replacing the streets and sidewalks of the central business district which, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (*Hague v. C.I.O* (1939) 307 U.S. 496, 515.) Because of the "growing importance of the shopping center[,] . . . to prohibit expressive activity in the centers would impinge on constitutional rights beyond speech rights," particularly the right to petition for redress of grievances. (*Pruneyard, supra,* 23 Cal.3d at p. 907.) Accordingly, we held that the California Constitution "protect[s]

speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Id.* at p. 910.) We added the caveat in *Pruneyard* that "[b]y no means do we imply that those who wish to disseminate ideas have free rein," noting our previous "endorsement of time, place, and manner rules." (*Ibid.*)

The Mall in the present case generally allows expressive activity, as mandated by the California Constitution, but requires persons wishing to engage in free speech in the Mall to obtain a permit. Under rule 5.6.2, the Mall will not issue a permit to engage in expressive activity unless the applicant promises to refrain from conduct "Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." We must determine, therefore, whether a shopping center violates California law by banning from its premises speech urging the public to boycott one or more of the shopping center's businesses.

The idea that private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks long predates our decision in *Pruneyard*. The United States Supreme Court recognized more than half a century ago that the right to free speech guaranteed by the First Amendment to the United States Constitution can apply even on privately owned land. In *Marsh v. Alabama* (1946) 326 U.S. 501, 502, the high court held that a Jehovah's Witness had the

right to distribute religious literature on the sidewalk near the post office of a town owned by the Gulf Shipbuilding Corporation, because the town had "all the characteristics of any other American town. . . . In short, the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." (*Id.* at pp. 502-503.) The high court stated: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (*Id.* at p. 506.)

This court followed the high court's decision in *Marsh* to hold that a shopping center could not prohibit a union's peaceful picketing of one of the shopping center's stores. (*Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*).) We recognized that peaceful picketing by a labor union "involves an exercise of the constitutionally protected right of freedom of speech." (*Id.* at p. 769.) We rejected the shopping center's argument that its right to "the exclusive possession and enjoyment of private property" outweighed the union's right to picket: "Because of the public character of the shopping center, however, the impairment of plaintiff's interest must be largely theoretical. Plaintiff has fully opened his property to the public." (*Id.* at p. 771.)

In *In re Hoffman* (1967) 67 Cal.2d 845, we reiterated that private property that was open to the public in the same manner as public streets or parks could constitute a public forum for free expression, holding that protesters had the right to express their opposition to the war in Vietnam by distributing leaflets in Union Station in Los Angeles, "a spacious area open to the community as a center for rail transportation" that was owned by three railroad companies. (*Id.* at p. 847.) This court reasoned that, with regard to distributing leaflets, "a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. [¶] Nor was there any other interest that would justify prohibiting petitioners' activities. Those activities in no way interfered with the use of the station. They did not impede the movement of passengers or trains, distract or interfere with the railroad employees' conduct of their business, block access to ticket windows, transportation facilities or other business legitimately on the premises. Petitioners were not noisy, they created no disturbance, and did not harass patrons who did not wish to hear what they had to say. [¶] Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave." (*Id.* at pp. 851-852, fn. omitted.)

In *In re Lane* (1969) 71 Cal.2d 872, we applied our earlier holding in *Schwartz-Torrance* to conclude that a union had a right to distribute handbills on a privately owned sidewalk outside a business. We held that the sidewalk "is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises." (*Id.* at p. 878.) We held, therefore, that the privately owned sidewalk was "a public area in which members of the public may exercise First Amendment rights," including peacefully distributing handbills: "[W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment. In utilizing the sidewalk for such purposes those seeking to exercise such rights may not do so in a manner to obstruct or unreasonably interfere with free ingress or egress to or from the premises." (*Ibid.*)

During the interim between our decisions in *Schwartz-Torrance* and *Lane*, the United States Supreme Court adopted a similar position, holding in *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 (disapproved in *Hudgens v. NLRB* (1976) 424 U.S. 507, 518) that peaceful picketing by union members of a business in a shopping center that employed nonunion workers was protected by the

First Amendment. The high court observed that that the shopping center in *Logan Plaza* "is clearly the functional equivalent of the business district" in *Marsh.* (*Food Employees v. Logan Plaza, supra,* 391 U.S. at p. 318.) The high court emphasized the importance of recognizing a union's right to peacefully picket in a shopping center: "Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." (*Id.* at pp. 324-325.)

In *Diamond v. Bland* (1970) 3 Cal.3d 653 (*Diamond I*), we went one step further than the decision in *Logan Plaza. Logan Plaza* held that a shopping center could not prohibit a union from peacefully picketing one of the stores in the center, but the issue in *Diamond I* was whether a privately owned shopping center could prohibit free speech activity that was *unrelated* to the business of the center. In *Diamond I,* a large privately owned shopping center refused to allow a group called the People's Lobby to solicit signatures on two antipollution initiative petitions. We noted that the United States Supreme Court had held in *Logan Plaza* that "a shopping center could not absolutely prohibit union picketing of a business located within the Center," but had

"expressly declined to decide whether 'respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.' [Citation.]" (*Id.* at p. 661.) We observed that, prior to the decision in *Logan Plaza,* we had "reached an identical result" in *Schwartz-Torrance,* holding that a shopping center could not prohibit peaceful union picketing of a business in the center and, in *Lane,* had extended that holding to apply to a privately owned sidewalk in front of a business. (*Ibid.*) We concluded that it was settled that a shopping center could not prohibit free speech activity, such as union picketing, that was related to the business of the shopping center: "This series of cases involving union picketing in shopping centers establishes constitutional protection for picketing and other First Amendment activities which are related in their purpose to the normal use to which the shopping center property is devoted." (*Ibid.*)

The issue presented in *Diamond I* was whether a privately owned shopping center could prohibit free speech activity that was *unrelated* to the business of the shopping center. We acknowledged that it was relevant that in both *Schwartz-Torrance* and *Logan Plaza* "the unions involved were picketing businesses located within the shopping centers," because that fact "strengthened the interest of the petitioners in their exercise of the First Amendment activities inside the shopping centers." (*Diamond I, supra,* 3

Cal.3d 653, 662.) We explained: "When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure." (*Ibid.*) But even though the interest in conducting free speech activity that is unrelated to the business of the shopping center is significantly less than the interest of a union to picket a business, it remained sufficiently substantial to outweigh the owner's interest in prohibiting such activity: "Therefore, although there is arguable merit to defendants' position that plaintiffs' interest in the exercise of their First Amendment rights at the Center may be less compelling than the First Amendment interests involved in *Schwartz-Torrance, Logan Plaza*, and *Lane,* their contention does not justify striking the balance in favor of defendants' property rights. As we have explained, plaintiffs' interest is of significant constitutional dimension, while defendants' concern is no stronger than the interests of the property owners in *Schwartz-Torrance, Logan*, and *Lane*." (*Id.* at p. 663.) Thus, a privately owned shopping center must permit not only peaceful picketing of businesses in the center, but further must permit free speech activity that is unrelated to the business of the shopping center.

Two years later, the United States Supreme Court in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, took a different course and disagreed with our decision in

Diamond I, holding to the contrary that a privately owned shopping center could prohibit First Amendment activity that was unrelated to the business of the center.

In light of the high court's decision in *Lloyd,* we reconsidered our decision in *Diamond I* and, in *Diamond v. Bland* (1974) 11 Cal.3d 331, 332 (*Diamond II*), held that a privately owned shopping center could prohibit free speech activity that was unrelated to the operation of the shopping center. Justice Mosk, joined by Justice Tobriner and, in part, by Justice Sullivan, filed a lengthy and impassioned dissent, urging the court to adhere to its decision in *Diamond I* on the basis of the California Constitution. He wrote: "For a number of years cases in this state even prior to the federal decision in [*Logan Plaza*] have held that union members enjoy the right to picket an employer on the property of a privately owned shopping center. These decisions emphasized that an employee who sought to bring his grievance to the attention of the public and apply economic sanctions against his employer could effectively do so only at the place where the business was located, and that any incidental impairment of the shopping center owner's property rights was largely theoretical since he had opened his premises to the public and his right in the property was 'worn thin by public usage.' [Citations.] . . . [¶] The *Diamond* [*I*] opinion recognized that although *Schwartz-Torrance* and *Lane* were factually distinguishable in some respects, the distinction did not justify striking a new balance to limit plaintiff's

freedom of expression." (*Diamond II, supra,* 11 Cal.3d 331, 341 (dis. opn. of Mosk, J.).)

The United States Supreme Court then abandoned its holding in *Logan Plaza* that a shopping center could not prohibit a union from peacefully picketing one of the stores in the center by holding in *Hudgens v. NLRB* (1976) 424 U.S. 507, 518, that "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan* [*Plaza*]." The United States Supreme Court thus held that the First Amendment did not guarantee the right to free speech in a shopping mall. This court, however, did not follow the lead of the high court. Rather, we heeded the wisdom of Justice Mosk's dissent in *Diamond II* and held in *Pruneyard* that the California Constitution granted a right to free speech in a privately owned shopping center. (*Pruneyard, supra,* 23 Cal.3d 899, 902.)

Our decision that the California Constitution protects the right to free speech in a shopping mall, even though the federal Constitution does not, stems from the differences between the First Amendment to the federal Constitution and article I, section 2 of the California Constitution. We observed in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 486, that the free speech clause in article I of the California Constitution differs from its counterpart in the federal Constitution both in its language and its scope. "It is beyond peradventure that article I's free speech clause enjoys existence and force independent of the First Amendment's. In section 24, article I

states, in these very terms, that '[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.' This statement extends to all such rights, including article I's right to freedom of speech. For the California Constitution is now, and has always been, a 'document of independent force and effect particularly in the area of individual liberties.' [Citations.]" (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at pp. 489-490.) "As a general rule, . . . article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.' [Citations.]" (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th 468, 491.)

In *Pruneyard, supra,* 23 Cal.3d 899, 902, high school students in the mall were prohibited from soliciting support for their opposition to a United Nations resolution against Zionism. We held that the mall could not prohibit the students' efforts despite the fact that this free speech activity was unrelated to the business of the center. (*Ibid.*) In so holding, we relied upon our earlier decision in *Schwartz-Torrance,* which, we noted, "held that a labor union has the right to picket a bakery located in a shopping center." (*Id.* at p. 909.) We cautioned, however, that we did not "imply that those who wish to disseminate ideas have free rein," noting our previous "endorsement of time, place, and manner rules." (*Id.* at p. 910.) We also repeated Justice Mosk's observation in his dissent in *Diamond II* that compelling a shopping center to

permit "'[a] handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations [citation] would not markedly dilute defendant's property rights.' [Citation.]" (*Id.* at p. 911, quoting *Diamond II, supra,* 11 Cal.3d 331, 345, dis. opn. of Mosk, J.)[5]

The Mall argues that its rule banning speech that advocates a boycott is a "reasonable regulation" designed to assure that free expression activities "do not interfere with normal business operations" within the meaning of our decision in *Pruneyard.*

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[5] The shopping center in *Pruneyard* appealed our decision to the United States Supreme Court, arguing that it violated the shopping center's constitutional right to control the use of its private property. (*PruneYard Shopping Center v. Robins, supra,* 447 U.S. 74, 79.) The high court disagreed, noting that its decision in *Lloyd* did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." (*Id.* at p. 81.) The court rejected the argument that compelling the shopping mall to permit expressive activity amounted to a taking of its private property, observing that it would not "unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." (*Id.* at p. 83.)

(*Pruneyard, supra,* 23 Cal.3d 899, 911.) According to the Mall, it "has the right to prohibit speech that interferes with the intended purpose of the Mall," which is to promote "the sale of merchandise and services to the shopping public." We disagree.

It has been the law since we decided *Schwartz-Torrance* in 1964, and remains the law, that a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests.[6] Our decision in *Diamond I* recognized that citizens have a strengthened interest, not a diminished interest, in speech that presents a grievance against a particular business in a privately owned shopping center, including speech that advocates a boycott.

In so holding in *Diamond I,* we added the caveats to which Justice Mosk referred in his dissent in

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[6] The Mall argues that we cannot rely upon the decisions in *Schwartz-Torrance, supra,* 61 Cal.2d 766, and *In re Lane, supra,* 71 Cal.2d 872, because they were based upon the First Amendment, but we have held that the "fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent." (*Pruneyard, supra,* 23 Cal.3d 899, 908.) As the plurality in *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013 later observed: "Although all of these cases relied on the First Amendment and the pre-*Lloyd* decisions of the United States Supreme Court . . . *Robins* [*v. Pruneyard Shopping Center*] found many of the principles enunciated in these cases persuasive in interpreting California's free speech clause. [Citation.]" (*Id.* at p. 1032 (plur. opn. of Brown, J.), fn. omitted.)

Diamond II (11 Cal.3d 331, 345), which we discussed in *Pruneyard* (23 Cal.3d 899, 911) and upon which the Mall in the present case relies: that a shopping center may prohibit conduct "calculated to disrupt normal business operations" or that would result in "obstruction of or undue interference with normal business operations." (*Diamond I, supra,* 3 Cal.3d 653, 665-666.) But this does not mean that shopping centers can prohibit speech that advocates a boycott. In adding these caveats recognizing a shopping center's right to impose reasonable regulations upon expressive activity, we used as examples our decisions in *Schwartz-Torrance* and *Lane,* both of which recognized the right of a union to picket a business and advocate a boycott. We expressly noted that we were approving regulations that would impose "reasonable limitation[s] as to time, place, or manner." (*Diamond I,* at p. 665.)[7] In light of the fact that we expressly relied upon, and extended, our decisions in

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[7] We provided examples of such regulations: "Moreover, the trial court findings in the instant action demonstrate the ability of Inland Center to regulate the various sales promotions and displays that are permitted in the common aisleways: 'In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors.' Similar regulations, if not repressive in scope, can be devised to protect Inland Center from actual or potential danger of First Amendment activities being conducted on its premises in a manner calculated to disrupt normal business operations and to interfere with the convenience of customers." (*Diamond I, supra,* 3 Cal.3d 653, 665.)

Schwartz-Torrance and *Lane,* which approved union activity advocating a boycott, it would make no sense to interpret this language in *Diamond I* (and its subsequent references in the dissent in *Diamond II* and the decision in *Pruneyard*) to suggest that shopping centers may prohibit speech that advocates a boycott.[8]

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[8] The United States Supreme Court recognized that, under the First Amendment, speech that does no more than attempt to peacefully persuade customers not to patronize a business cannot be banned on the ground that it interferes with normal business operations. The high court held that the fact that customers might be persuaded not to patronize a business did not justify restricting speech advocating a boycott: "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. *But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. . . .* We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion. . . ." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 104-105, italics added, fn. omitted.)

This important distinction between urging customers to boycott a business and physically impeding access to that business was recognized in *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, which affirmed convictions for trespass of protesters who blocked the entrance to a bank, while recognizing the right of the protesters to peacefully picket, observing that the protesters "may call the bank to task for its wrongs, real or not, but

(Continued on following page)

The level of scrutiny with which we review a restriction of free speech activity depends upon whether it is a content-neutral regulation of the time, place, or manner of speech or restricts speech based upon its content. A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is "(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication. [Citation.]" (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 364 (*Alliance*).) A content-based restriction is subjected to strict scrutiny. "[D]ecisions applying the liberty of speech clause [of the California Constitution], like those applying the First Amendment, long have recognized that in order to qualify for intermediate scrutiny (i.e., time, place, and manner) review, a regulation must be 'content neutral' [citation], and that if a regulation is content based, it is subject to the more stringent strict scrutiny standard. [Citation.]" (*Id.* at pp. 364-365, fn. omitted.)[9]

Prohibiting speech that advocates a boycott is not a time, place, or manner restriction because it is not

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they may not themselves interfere with anything but the minds of their audience." (*Id.* at p. Supp. 937.)

[9] "Clearly, government has no power to restrict [expressive] activity because of its message. Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 115, fns. omitted.)

content neutral. The Malls' rule prohibiting persons from urging a boycott is improper because it does not regulate the time, place, or manner of speech, but rather bans speech urging a boycott because of its content. Restrictions upon speech "'that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.' [Citation.]" (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 877.)

The Mall argues that its rule prohibiting speech that urges a boycott is "a 'content-neutral' restriction under California law because it applies to any and all requests for a consumer boycott of the Mall's merchants . . . regardless of the subject matter or viewpoint of the speaker advocating the boycott. . . ." The Mall is mistaken. The Mall's rule prohibiting all boycotts may be *viewpoint neutral,* because it treats all requests for a boycott the same way,[10] but it is not *content neutral,* because it prohibits speech that urges a boycott while permitting speech that does not.

In *Boos v. Barry* (1987) 485 U.S. 312, 315, the high court considered a provision that prohibited "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" This provision was content based, because whether a sign was permitted depended upon whether it was "critical

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[10] The parties dispute whether the rule is viewpoint neutral. We express no view on this question.

of the foreign government or not. One category of speech has been completely prohibited. . . ." (*Id.* at pp. 318-319.)[11] The high court rejected the argument that the provision was content neutral because the government did not select between viewpoints, but rather prohibited all signs adverse to a foreign government's policies: "While this prevents the display clause from being directly viewpoint-based, . . . it does not render the statute content-neutral. . . . [A] regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.' [Citation.] Here the government has determined that an entire category of speech – signs or displays critical of foreign governments – is not to be permitted." (*Id.* at p. 319.) We find this reasoning persuasive; the Mall has prohibited an entire category of speech – speech that advocates a boycott. Thus, the Mall's rule is content based and must be given strict scrutiny. (*Alliance, supra,* 22 Cal.4th 352, 365; *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 1170.)

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[11] This portion of Justice O'Connor's opinion was joined by only two other justices: Justices Stevens and Scalia. But Justice Brennan made clear in his concurring opinion, which was joined by Justice Marshall, that he agreed the provision was content based and wrote separately to distance himself from other language discussing the secondary effects of the speech. (*Boos v. Barry, supra,* 485 U.S. 312, 334 (conc. opn. of Brennan, J.).)

The Mall asserts that our decision in *Alliance, supra,* 22 Cal.4th 352, supports its position that its rule is not content based, but the Mall's reliance is misplaced. In that case, we held that "an ordinance . . . that is directed at activity involving public solicitation for the immediate donation or payment of funds should not be considered content based . . . and should be evaluated under the intermediate scrutiny standard applicable to time, place, and manner regulations, rather than under the strict scrutiny standard." (*Id.* at p. 357.) The ordinance at issue in *Alliance* made it unlawful to solicit or beg "'with the purpose of obtaining an immediate donation of money or other thing of value'" in certain areas, such as near a bank or automated teller machine, or in any public place if the solicitation was done in an "'aggressive manner.'" (*Id.* at p. 363, italics omitted.)

The Mall argues that "boycotts can be prohibited for the same reason that the solicitation of funds can be prohibited," but this argument does not withstand analysis. In holding that the ordinance in *Alliance* banning solicitation for immediate donation or exchange of funds was content neutral, we explained that the United States Supreme Court used the rule "that a restriction is content neutral if it is 'justified without reference to the content of the regulated speech.' [Citations.]" (*Alliance, supra,* 22 Cal.4th 352, 367.) This rule does "*not* require literal or absolute content neutrality, but instead require[s] only that the regulation be 'justified' by legitimate concerns that are unrelated to any 'disagreement with the

message' conveyed by the speech. [Citation.]" (*Id.* at p. 368.) We then focused on the manner in which a face-to-face solicitation asking for an immediate donation is conducted. By its very nature, this type of solicitation "may create distinct problems and risks that warrant different treatment and regulation" than other forms of speech-related activity. (*Id.* at p. 357.) Such a solicitation was "'disruptive of business'" because it "'impedes the normal flow of traffic.'" (*Id.* at p. 369, quoting *United States v. Kokinda* (1990) 497 U.S. 720, 733-734.) Additionally, "'[i]n-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress.'" (*Alliance*, at p. 371, quoting *International Soc. for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 705 (conc. opn. of Kennedy, J.).) The ordinance in *Alliance* was directed at the conduct and intrusiveness that face-to-face solicitation for immediate donation or exchange of funds inherently promotes. We therefore found the ban on certain solicitations to be content neutral because it was justified by legitimate concerns that were unrelated to content.

The rule at issue here prohibiting speech that advocates a boycott cannot similarly be justified by legitimate concerns that are unrelated to content. Peacefully urging a boycott in a mall does not by its nature cause congestion, nor does it promote fraud or duress. "[T]he boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." (*NAACP v.*

Claiborne Hardware Co. (1982) 458 U.S. 886, 907, fn. omitted.) Our California Constitution provides greater, not lesser, protection for this traditional form of free speech. (See *Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th 468, 491.) Unlike the ordinance in *Alliance,* the Mall's rule in the instant case is not concerned with the inherently intrusive nature of such speech, but rather with the impact such speech may have on its listeners. "Handbills . . . 'depend entirely on the persuasive force of the idea.' [Citation.]" (*DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568, 580.) "The loss of customers because they read a handbill urging them not to patronize a business . . . is the result of mere persuasion. . . ." (*Ibid.*) The Mall is concerned that the speech may be effective and persuade customers not to patronize a store. But "[l]isteners' reaction to speech is not a content-neutral basis for regulation." (*Forsyth County v. Nationalist Movement* (1992) 505 U.S. 123, 134 [basing the amount of a permit fee on the degree of hostility the message would create is a content-based regulation of speech].) The Mall seeks to prohibit speech advocating a boycott solely because it disagrees with the message of such speech, which might persuade some potential customers not to patronize the stores in the Mall.

The Mall relies heavily on a Court of Appeal decision that also involved a solicitation of funds and predates our decision in *Alliance. H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3d 1193, 1203 (H-CHH), held that a shopping

mall properly could prohibit the solicitation of "'contributions or donations from anyone on center property.'" Citing as authority only a decision of the Third Circuit Court of Appeals (*Intern. Soc. for Krishna v. New Jersey Sports, etc.* (3d Cir.1982) 691 F.2d 155), the Court of Appeal in *H-CHH* concluded that "the solicitation of political funds is entirely incompatible with the normal character and function of the Plaza. The Plaza exists as a center of commerce. . . . Any activity seeking to solicit political contributions necessarily interferes with that function by competing with the merchant tenants for the funds of Plaza patrons." (*H-CHH, supra,* 193 Cal.App.3d at p. 1221.)

Although as noted above, solicitations for immediate donations may be restricted based upon "the inherently intrusive and potentially coercive nature of that *kind* of speech" (*Alliance, supra,* 22 Cal.4th 352, 373), the decision in *H-CHH* was incorrect that solicitations of funds may be prohibited simply because they compete with the shopping center's merchants. Relying upon the fact that a solicitation of funds competes with the shopping center merchants, as did the court in *H-CHH* and as does the Mall in this case, would lead to the conclusion that all solicitations of funds may be prohibited, even those that are not inherently intrusive or potentially coercive. Such a restriction would be too broad.[12]

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[12] We disapprove the decision in *H-CHH Associates v. Citizens for Representative Government, supra,* 193 Cal.App.3d 1193, to the extent it states a contrary view.

We conclude, therefore, that the Mall's rule prohibiting all speech that advocates a boycott is content based and thus is subject to strict scrutiny. (*Alliance, supra,* 22 Cal.4th 352, 365.) Strict scrutiny for purposes of the federal Constitution means that a content-based speech restriction must be "necessary to serve a compelling state interest, and . . . narrowly drawn to achieve that end." (*Arkansas Writers' Project, Inc. v. Ragland* (1987) 481 U.S. 221, 231.) The right to free speech in shopping centers that constitute public fora under the California Constitution deserves no less protection. In order to ensure that regulations of speech are not "based on hostility – or favoritism – towards the underlying message expressed'" (*Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 642), a content-based rule limiting expression in a shopping center that constitutes a public forum must be necessary to serve a compelling interest and be narrowly drawn to achieve that end.

The Mall's rule prohibiting speech that advocates a boycott cannot withstand strict scrutiny. The Mall's purpose to maximize the profits of its merchants is not compelling compared to the Union's right to free expression. Urging customers to boycott a store lies at the core of the right to free speech. (*NAACP v. Claiborne Hardware Co., supra,* 458 U.S. 886, 911 ["boycott clearly involved constitutionally protected activity"].) "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is

essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." (*Thornhill v. Alabama, supra,* 310 U.S. 88, 95.) The fact that speech may be convincing is not a proper basis for prohibiting it. The right to free speech "extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. [Citations.]" (*Thomas v. Collins* (1945) 323 U.S. 516, 537.) The Mall cites no authority, and we are aware of none, that holds that a store has a compelling interest in prohibiting this traditional form of free speech.

A shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution. Shopping malls may enact and enforce reasonable regulations of the time, place and manner of such free expression to assure that these activities do not interfere with the normal business operations of the mall, but they may not prohibit certain types of speech based upon its content, such as prohibiting speech that urges a boycott of one or more of the stores in the mall.

CONCLUSION

We hold that, under California law, Fashion Valley Mall may not maintain and enforce against the Union its rule 5.6.2, which prohibits "[u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."

MORENO, J.

WE CONCUR: GEORGE, C.J.
KENNARD, J.
WERDEGAR, J.

COPY

FASHION VALLEY MALL, LLC v. NATIONAL LABOR RELATIONS BOARD

S144753

DISSENTING OPINION BY CHIN, J.

I dissent.

By a bare four-to-three majority, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*)[1] overruled a decision then only five years

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[1] Courts have not been consistent in giving this case a shorthand name. For example, the plurality, concurring, and dissenting opinions in *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013 (*Golden Gateway*)

(Continued on following page)

old and held that public free speech rights exist on private property under the California Constitution. *Pruneyard* was wrong when decided. In the nearly three decades that have since elapsed, jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone.

Even if we do not overrule *Pruneyard, supra,* 23 Cal.3d 899, we should at least not carry it to the extreme that the majority does. *Pruneyard* is easily distinguished. The free speech activity that *Pruneyard* sanctioned was compatible with normal use of the property. The opposite is true here. Fashion Valley Mall is a privately owned shopping center. A shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to compel a private property owner to allow an activity that contravenes the property's purpose.

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called it *Robins* for short. But because the majority here calls it *Pruneyard*, I will do so also.

I. THE FACTS

Fashion Valley Mall, LLC (Fashion Valley), owns a large shopping mall in San Diego (the mall). Fashion Valley permits expressive activities inside the mall by those who apply for a permit and agree to abide by its regulations. An applicant for a permit must state the purpose of the proposed expressive activity, submit a copy or a description of any materials and signs to be used, list the participants, provide a $50 refundable cleaning deposit, and purchase insurance as necessary. Additionally, pursuant to Fashion Valley's rule 5.6.2 (rule 5.6.2), the applicant must agree to abstain from "Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."

In October 1998, approximately 30 members and supporters of the Graphic Communications International Union (Union) gathered outside the Robinsons-May department store at the mall to protest actions taken by The San Diego Union-Tribune newspaper. The Union decided to stage the protest there because the store advertises in the newspaper and is located not far from the newspaper's premises. The protestors distributed a handbill addressed, "Dear customer of Robinsons-May," that outlined the Union's grievances against the newspaper. The handbill made clear "[t]o the employees of Robinsons-May . . . [the] dispute is with The San Diego Union-Tribune. We are not asking you to cease working for your employer." The Union encouraged patrons and employees to call the

newspaper's chief executive officer. The handbill stated that "Robinsons-May advertises with the Union-Tribune." After about 15 minutes, a representative of Fashion Valley approached the protestors, explained that a permit was required for expressive activity, and told them to leave the premises, which they did.

Later, instead of applying for a permit, the Union filed a charge with the National Labor Relations Board (Board) alleging that Fashion Valley had violated section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the act. That section guarantees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) An administrative law judge, and later the Board, held that Fashion Valley did violate section 8(a)(1). The Board ordered Fashion Valley to rescind rule 5.6.2.

Fashion Valley petitioned the District of Columbia Circuit to review the Board's decision. The court "h[e]ld that whether Fashion Valley violated the [National Labor Relations Act] depends upon whether it had the right, under California law, to maintain and enforce its anti-boycott rule." (*Fashion Valley Mall, LLC. v. N.L.R.B.* (D.C. Cir. 2006) 451 F.3d 241,

242 (*Fashion Valley*).) Pursuant to California Rules of Court, former rule 29.8 (now rule 8.548), it requested us to answer the following question: "Under California law may Fashion Valley maintain and enforce against the Union its Rule 5.6.2?" (*Fashion Valley, supra,* at p. 246.) We granted the request. Later, we permitted the Union to intervene in the action. (Code Civ. Proc., § 387, subd. (a).)

II. Discussion

The issue here is straightforward: Does the California Constitution compel the owner of a private shopping center to allow persons on its property to urge potential customers to boycott businesses within the center? Saying yes, the majority relies primarily on *Pruneyard, supra,* 23 Cal.3d 899. To place this issue in perspective, I first provide a historical review. Then I will explain why we should overrule *Pruneyard.* Finally, I will show that *Pruneyard,* even if still considered the law in California, is entirely distinguishable.

A. Historical Review

At one time, both this court and the United States Supreme Court held that, in some situations, constitutional free speech rights existed on private property. (E.g., *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 (*Logan*) [private shopping center]; *Marsh v. Alabama* (1946) 326 U.S. 501 (*Marsh*) [company town]; *Diamond v. Bland* (1970) 3 Cal.3d

653 (*Diamond I*) [private shopping center]; *In re Lane* (1969) 71 Cal.2d 872 (*Lane*) [stand-alone grocery store]; *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*) [private shopping center].) Because both the United States and the California Constitutions seemed to be the same in this regard, this court did not clearly establish which Constitution it relied on in finding free speech rights. We treated the two Constitutions as essentially interchangeable. For example, our opinion in *Schwartz-Torrance, supra,* at pages 771-773, relied in part on *Marsh,* as well as cases from other states, and our opinions in *Lane, supra,* at pages 874-877, and *Diamond I, supra,* at pages 658-660, relied heavily on *Marsh* and *Logan.* As of 1970, our jurisprudence was consistent with high court jurisprudence in this area.

All this changed in the decade of the 1970's regarding private shopping centers. In two decisions, the United States Supreme Court reversed *Logan, supra,* 391 U.S. 308, and held that no free speech rights exist in private shopping centers under the United States Constitution. (*Hudgens v. NLRB* (1976) 424 U.S. 507 (*Hudgens*); *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 (*Lloyd Corp.*).) As we recently explained, the *Hudgens* court "held that a union had no federal constitutional right to picket in a shopping center because the actions of the private owner of the shopping center did not constitute state action." (*Golden Gateway, supra,* 26 Cal.4th at p. 1019 (plur. opn.).)

The question whether the new high court decisions affected California law arose promptly. Even before the second of these decisions, we reconsidered our decision in *Diamond I, supra,* 3 Cal.3d 653, in a second case of the same name. In *Diamond v. Bland* (1974) 11 Cal.3d 331 (*Diamond II*), we followed the high court and held that "defendants' private property interests outweigh plaintiffs' own interests in exercising First Amendment rights in the manner sought herein." (*Id.* at p. 335.) We noted that "[o]ur prior holding in [*Diamond I*] was based primarily upon our interpretation of the rationale of two cases of the United States Supreme court, namely, *Marsh v. Alabama,* 326 U.S. 501, and *Food Employees v. Logan Plaza,* 391 U.S. 308." (*Id.* at pp. 333-334.) *Diamond II* was decided by a vote of four to three. Justice Burke authored the majority opinion and was joined by Chief Justice Wright and Justices McComb and Clark. Justice Mosk, the author of *Diamond I,* dissented in *Diamond II* and was joined by Justice Tobriner and, in part, Justice Sullivan. Justice Mosk would have reaffirmed the holding of *Diamond I* but grounded it solely on California constitutional law.

Our adherence to high court jurisprudence in this area did not last long. Shortly after our 1974 decision in *Diamond II, supra,* 11 Cal.3d 331, the composition of this court changed. This change led, in 1979, to another four-to-three decision. In *Pruneyard, supra,* 23 Cal.3d 899, we overruled *Diamond II, supra,* 11 Cal.3d 331, and effectively reinstated *Diamond I, supra,* 3 Cal.3d 653. The majority opinion, authored

by Justice Newman and joined by Chief Justice Bird and Justices Tobriner and Mosk, relied heavily on Justice Mosk's dissenting opinion in *Diamond II*. It noted that the California Constitution uses different language than does the United States Constitution in guaranteeing free speech rights. California Constitution, article I, section 2, subdivision (a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The First Amendment to the United States Constitution more concisely protects "the freedom of speech."

Pruneyard held "that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." (*Pruneyard, supra,* 23 Cal.3d at p. 902.) More generally, it stated that the California Constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Id.* at p. 910.) Justice Richardson, joined by Justices Clark and Manuel dissented. (*Id.* at pp. 911-916.) The United States Supreme Court later affirmed *Pruneyard* (*sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74), but only to the extent of holding that federal law did not prevent California from providing greater speech rights on private shopping centers than the federal Constitution provides.

As I show in the next section, history has not been kind to the majority opinion in *Pruneyard*.

B. *Pruneyard* Revisited

Pruneyard, supra, 23 Cal.3d 899, was controversial when decided. In the three decades since then, it has received scant support and overwhelming rejection around the country. As the 2001 plurality opinion in *Golden Gateway* noted, "most of our sister courts interpreting state constitutional provisions similar in wording to California's free speech provision have declined to follow [*Pruneyard*]. [Fn. omitted.] Indeed, some of these courts have been less than kind in their criticism of [*Pruneyard*]." (*Golden Gateway, supra,* 26 Cal.4th at pp. 1020-1021.)[2] The opinion fully supported these statements with citations to decisions from the many jurisdictions that have considered but rejected *Pruneyard,* and the few that have followed its lead to a limited extent. I need not repeat those citations. (*Golden Gateway, supra,* 26 Cal.4th at pp. 1021-1022, fn. 5.)

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[2] For example, the New York Court of Appeal, in an opinion that found no right to free speech in a privately owned shopping center under a state constitutional free speech provision that is essentially identical to California's, described this court's "4-3 decision" in *Pruneyard* as "hardly persuasive authority. That court, in overruling its own contrary precedent only five years old [citing *Diamond II, supra,* 11 Cal.3d 331], simply said that the California Constitution protected speech and petitioning at private shopping centers. There is not much analysis and only tangential discussion, if it can be called that, of the State action question. It is evident that the result in [*Pruneyard*] was dictated by 'the accident of a change of personalities in the Judges of [the] court'. . . ." (*SHAD Alliance v. Smith Haven Mall* (N.Y. 1985) 488 N.E.2d 1211, 1215, fn. 5.)

As of the time we decided *Golden Gateway,* the following states, many with constitutional free speech language essentially identical to California's, had rejected any form of a *Pruneyard* approach regarding shopping centers and free speech rights: Arizona, Connecticut, Georgia, Michigan, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, and Wisconsin. (See *Golden Gateway, supra,* 26 Cal.4th at pp. 1020-1021 & fn. 5; *United Food v. Crystal Mall Associates* (Conn. 2004) 852 A.2d 659, 667-668 (*United Food*); Annot., Validity, Under State Constitutions, of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity (1997) 52 A.L.R.5th 195.) Nevertheless, the *Golden Gateway* court followed *Pruneyard* as the law of California. The plurality, which I joined, did so reluctantly, and only due to principles of stare decisis. (*Golden Gateway, supra,* 26 Cal.4th at p. 1022.)

In the six years since we decided *Golden Gateway, supra,* 26 Cal.4th 1013, we have become yet more isolated. No new state has followed our lead. Two more states have refused to follow the *Pruneyard* approach: Hawaii and Iowa. (*State v. Viglielmo* (Hawaii 2004) 95 P.3d 952; *City of West Des Moines v. Engler* (Iowa 2002) 641 N.W.2d 803.) Moreover, as I explain, the few

states that previously adopted an approach like *Pruneyard* are generally retreating.[3]

I need not review all of the cases because three years ago the Connecticut Supreme Court did so. (*United Food, supra,* 852 A.2d 659, 667-668.) In *United Food,* the court unanimously refused to reconsider its earlier decision of *Cologne v. Westfarms Associates* (Conn. 1984) 469 A.2d 1201 (*Cologne*), which had rejected *Pruneyard* even though Connecticut's constitutional free speech provisions are essentially identical to California's. (*United Food, supra,* 852 A.2d 659.)[4] It explained that "[s]ince the decision in *Cologne,* courts in other jurisdictions that have considered this issue overwhelmingly have chosen *not* to interpret their state constitutions as requiring private property owners, such as those who own large shopping malls, to permit certain types of speech, even political speech, on their premises." (*United Food,* at p. 667.) It summarized the law that most of

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[3] Additionally, the Supreme Courts of Illinois, Nebraska, and Nevada have cited but declined to follow the *Pruneyard* approach in various free speech contexts. (*People v. DiGuida* (Ill. 1992) 604 N.E.2d 336, 340, 342-347; *Dossett v. First State Bank, Loomis* (Neb. 2001) 627 N.W.2d 131, 138-139; *S.O.C., Inc. v. Mirage Casino-Hotel* (Nev. 2001) 23 P.3d 243, 250.)

[4] Article I, section 4, of the Connecticut Constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Article I, section 5, of that Constitution provides: "No law shall ever be passed to curtail or restrain the liberty of speech. . . ." (See *United Food, supra,* 852 A.2d at p. 660, fns. 3, 4.)

the country has adopted: "Under *Cologne,* as in the overwhelming majority of our sister jurisdictions, the size of the mall, the number of patrons it serves, and the fact that the general public is invited to enter the mall free of charge do not, even when considered together, advance the plaintiff's cause in converting private action into government action." (*Id.* at p. 673.)

As explained in *United Food, supra,* 852 A.2d at pages 668-670, only four other states (Colorado, Massachusetts, New Jersey, and Washington) retain any form of independent state grounds in this area. Washington has very narrowly confined its original independent state ground decision. (*Southcenter Joint Venture v. National Democratic Policy Com.* (Wn. 1989) 780 P.2d 1282; see the discussions in *Golden Gateway, supra,* 26 Cal.4th at p. 1021, fn. 5; *United Food, supra,* 852 A.2d at pp. 668, 669 & fns. 13, 16; and *State v. Viglielmo, supra,* 95 P.3d at pp. 964-965.) Regarding Massachusetts, the Connecticut Supreme Court explained, "'The Massachusetts decision was expressly limited to the solicitation of signatures needed by political candidates for access to the ballot and relied, not upon its freedom of speech provision, but upon a state constitutional guarant[ee] of an equal right to elect officers and to be elected, for public employments. [Citation.]'" (*United Food, supra,* 852 A.2d at p. 669, quoting the court's earlier decision in *Cologne, supra,* 469 A.2d 1201.) Colorado recently permitted a shopping center to adopt substantial restraints on the exercise of free speech on its property despite its earlier *Pruneyard*-like stance.

(*Robertson v. Westminster Mall Co.* (Colo.Ct.App. 2001) 43 P.3d 622.) That leaves New Jersey; and even that state has not, to my knowledge, carried its jurisprudence to the extreme the majority is leading California.

The time has come to recognize that we are virtually alone, and that *Pruneyard* was ill-conceived. Oregon originally had its own version of *Pruneyard,* albeit one based on a different constitutional provision. (*Lloyd Corporation v. Whiffen* (Or. 1993) 849 P.2d 446.) That decision, also by a four-to-three vote, relied in part on "the decision by the California Supreme Court in [*Pruneyard*]. . . ." (*Id.* at p. 454.) Later the Oregon Supreme Court concluded that *Lloyd Corporation v. Whiffen, supra,* 849 P.2d 446, was erroneous and "disavowed" it. (*Stranahan v. Fred Meyer, Inc.* (Or. 2000) 11 P.3d 228, 243; see *Golden Gateway, supra,* 26 Cal.4th at p. 1021, fn. 5.) It also refused to find free speech rights on private property under the Oregon Constitution's free speech provision, which, like Connecticut's, is essentially identical to California's. (*Stranahan v. Fred Meyer, Inc., supra,* at pp. 243-244, fn. 19.)[5] We should do what Oregon did and disavow *Pruneyard.*

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[5] Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right." (See *Stranahan v. Fred Meyer, Inc., supra,* 11 P.3d at p. 231, fn. 3.)

In *Lloyd Corp.,* the high court distinguished its earlier decision of *Marsh, supra,* 326 U.S. 501, which involved a company town. It explained that *Marsh* "involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." (*Lloyd Corp., supra,* 407 U.S. at p. 569, fn. omitted.) But a shopping center is different from a company town. "[P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." (*Ibid.*) I, along with the many jurisdictions that have followed the high court, agree.

As the plurality opinion in *Golden Gateway* explained, principles of stare decisis should make us cautious before we overrule a previous case. There should be a special justification for doing so. (*Golden Gateway, supra,* 26 Cal.4th at p. 1022.) But we do sometimes overrule our prior decisions, and appropriately so. In this case it would be entirely proper to do

so, especially in light of our increasing isolation in the six years since *Golden Gateway* was decided. The *Pruneyard* court itself ignored stare decisis. It overruled a decision of this court that was only five years old at the time. Why should a decision that overruled a recent decision, and that identified nothing that occurred in the intervening years to justify the action, be sheltered from reconsideration? In essence, there were two four-to-three decisions in the 1970's that reached opposite results. Indeed, of the 11 justices who participated in *Diamond II, supra,* 11 Cal.3d 331, or *Pruneyard, supra,* 23 Cal.3d 899, or both, a majority of six followed or would have followed the high court (Chief Justice Wright and Justices McComb, Burke, Clark, Richardson, and Manuel), and only five urged or joined what would become the *Pruneyard* approach (Chief Justice Bird, and Justices Tobriner, Mosk, Sullivan, and Newman). I would join the majority of six, as have most of the jurisdictions that have considered the question.

Moreover, the *Pruneyard* court made no effort to find anything in the text of article I, section 2, subdivision (a) of the California Constitution, its historical sources, or the process that led to its adoption, that suggests any intent to extend its terms to private property. Instead, as the Wisconsin Supreme Court observed in a case that rejected *Pruneyard* even though Wisconsin's constitutional free speech provision is essentially identical to California's, "the majority [in *Pruneyard*] did not analyze the constitutional sections, but rather summarily stated the protections

granted by those sections. It appears to be more a decision of desire rather than analytical conviction." (*Jacobs v. Major* (Wis. 1987) 407 N.W.2d 832, 841.)[6]

I do not denigrate free speech rights. As the New York Court of Appeal stated in its opinion rejecting *Pruneyard,* "the right to free expression is one of this Nation's most cherished civil liberties." (*SHAD Alliance v. Smith Haven Mall, supra,* 488 N.E.2d at p. 1212; see also *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 970-977 (dis. opn. of Chin, J.).) But free speech rights and private property rights can and should coexist. The last 30 years have not seen a significant diminution of free speech opportunities in the many jurisdictions that have followed the high court's lead regarding private property. The Union here is not without recourse if it wants to urge a lawful boycott of any business or engage in any other protected freedom of expression. It has plenty of outlets to exercise its free speech rights. If it wants to picket, it simply has to do so on public property or seek permission from private property owners. The Union can exercise its free speech rights, for example, just outside the shopping center, including near the entrances. Additionally, and especially today with the

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[6] Article I, section 3, of the Wisconsin Constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." (See *Jacobs v. Major, supra,* 407 N.W.2d at p. 833, fn. 1.)

advent of the Internet and other forms of mass communication, "other public forums [are available] for the distribution and dissemination of . . . ideas." (*Diamond II, supra,* 11 Cal.3d at p. 334.) But I would find no right to engage in speech activity on private property over the owner's objection.

C. Pruneyard Distinguished

Even if we stubbornly maintain our position of "magnificent isolation"[7] in the face of this tide of history, we should not carry *Pruneyard* to the extreme of forbidding private property owners from controlling expressive activity on their property – urging a boycott of its tenants – that is *inimical* to the purpose for which the property is being used. *Pruneyard* is readily distinguishable.

Assuming free speech rights exist in shopping centers, the fact remains that they are not Hyde Park in London, Central Park in New York, or the National Mall in Washington, D.C., areas that are quintessential public free speech zones. Shopping centers are private property dedicated to doing business. Their owners should not have to permit all expressive activity that the California and United States Constitutions protect in public places. A shopping center

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[7] The court in *Andersen v. United States* (9th Cir.1956) 237 F.2d 118, 127, so described the position of the two jurisdictions that adopted or followed the infamous "product rule" for insanity stated in *Durham v. United States* (D.C. Cir. 1954) 214 F.2d 862.

owner should be allowed to enforce reasonable restrictions to protect its business activities even if the government could not impose similar restrictions. Rule 5.6.2 is such a restriction.

In *Pruneyard,* the activity the majority compelled a shopping center owner to permit on its property was the soliciting of signatures for a petition to the government. (*Pruneyard, supra,* 23 Cal.3d at p. 902.) Likewise, in *Diamond I,* the activity was "securing signatures on two anti-pollution initiative petitions." (*Diamond I, supra,* 3 Cal.3d at p. 655.) Soliciting petition signatures, and much other free speech activity, although perhaps not furthering the shopping center's business, is fully compatible with that business. The same is not true here. The purpose of a shopping center is to provide a place where the tenants, i.e., the individual businesses, may do business. Urging a boycott of a tenant's business is antithetical to that purpose. We should not compel shopping center owners to permit activity that interferes with the purpose for the center's existence.

Pruneyard's own analysis permits this conclusion. "By no means do we imply that those who wish to disseminate ideas have free rein. . . . [A]s Justice Mosk stated in *Diamond II,* '. . . A handful of additional orderly persons soliciting signatures and distributing handbills in connection [with the shopping center], under reasonable regulations adopted by defendant to assure that these activities do not interfere *with normal business operations* (see *Diamond* [*I*] at p. 665) *would not markedly dilute defendant's*

property rights.' (11 Cal.3d at p. 345 (dis. opn. of Mosk, J.).)" (*Pruneyard, supra,* 23 Cal.3d at pp. 910-911, italics added.)

Diamond I was also limited in its reach. We stressed that "[i]t bears repeating that no evidence was presented to the trial court that plaintiffs' activities actually interfered with the normal business operations of the [shopping center]. Plaintiffs do not contend that they are entitled to use private property for the dissemination of ideas without limitations *imposed by reasonable regulations designed to protect the business activities* of the Center. . . . [¶] We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights [obviously, now limited to free speech rights under the California Constitution] be exercised, if at all, through *reasonable regulations calculated to protect their business interests* rather than through absolute bans on all nonbusiness-related activities. Shopping centers . . . are not incapable of regulating permissible activities." (*Diamond I, supra,* 3 Cal.3d at p. 665, fn. omitted, italics added.)

A reasonable interpretation of these decisions, and one that would at least nudge this court toward the judicial mainstream, is that shopping center owners may impose reasonable regulations to protect their business interests, and that rule 5.6.2 is such a reasonable regulation. Compelling property owners to permit use of their property that would hinder business success *would* markedly dilute their property

rights. Fashion Valley should at least be able to protect its business interests by enforcing rule 5.6.2.

It is true that two old cases that predate *Hudgens, supra,* 424 U.S. 507, *Lloyd Corp., supra,* 407 U.S. 551, and *Diamond II, supra,* 11 Cal.3d 331, involved boycotts. (*Lane, supra,* 71 Cal.2d 872; *Schwartz-Torrance, supra,* 61 Cal.2d 766.) It is also true that the majority opinion in *Pruneyard* cited those cases with approval. (*Pruneyard, supra,* 23 Cal.3d at pp. 908-909.) But the fact remains that they were based in large part on federal law that has since been discredited, and the belief that federal and state constitutional law coincided in this area. *Pruneyard* should at least be interpreted on its facts and its holding. It cannot somehow have revalidated old cases that had different facts and were decided under a legal landscape that is now obsolete.

Lane involved "an individual grocery store." (*Lane, supra,* 71 Cal.2d at p. 873.) But recent Court of Appeal decisions have definitively held that *Pruneyard* does *not* extend to stand-alone stores like the one in *Lane*. (*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106 [grocery store]; *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425 [retail store]; see also *Waremart Foods v. N.L.R.B.* (D.C. Cir. 2004) 354 F.3d 870 [grocery store].) These cases found *Pruneyard's* citation of *Lane* and *Schwartz-Torrance* not dispositive. As the *Albertson's, Inc.* court noted in refusing to follow *Lane*, "we are not aware of any legal principle by which a court, years after rendering a decision, can

retroactively alter its ratio decidendi." (*Albertson's, Inc., supra,* at p. 123; see also *Trader Joe's Co., supra,* at p. 436 [*Pruneyard's* reference "to *Lane* was brief and collateral"].)

Today's majority opinion carefully says nothing casting doubt on the recent cases involving stand-alone stores, and they are surely correct. But if the older cases cited in *Pruneyard* are no longer authoritative in *that* respect, why should they be any more authoritative in *this* respect? In fact, they are no longer authoritative at all. If we are to preserve *Pruneyard,* we should at least interpret it on its own, and not be bound by ancient cases based on law that has long since disappeared.

The majority is also inconsistent in its treatment of First Amendment law. It rejects First Amendment law entirely as it relates to private property – law that is directly on point here – but then it relies heavily on First Amendment cases that involve restrictions the *government* has placed on speech. (Maj. opn., *ante,* at pp. 19-24.) It cites the federal strict scrutiny test that applies to *governmental* restrictions and that requires the government to show the restriction serves a compelling *state* interest. (*Id.* at p. 23.) It relies on, and quotes selectively from, *Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 642, which says, "'The *government* may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed.'" (Italics added; see maj. opn., *ante,* at p. 23.) It then asserts, with no apparent awareness of the

distinction – vital under the First Amendment – between governmental action and actions by private property owners, that the same rules apply here. (*Ibid.*)

The strict scrutiny test that applies to the government has no application to action by private landowners involving their own property. Even if it did, it would have to be adapted to recognize the fact that no governmental action is involved. The compelling *state* interest test would have to yield to some kind of "compelling landowner interest" test. A property owner can assert its own interests only, not the state's. If that test applied here, it would be met. Furthering business on its private property is not only a compelling interest, it is the property owner's primary concern; doing business is the reason the shopping center exists. In implementing rule 5.6.2, Fashion Valley is merely preventing persons from using its property to urge potential patrons not to do business with its tenants. The Union may urge a boycott if it wishes, just not on private property without permission.

In finding no compelling interest, the majority merely asserts that the right of persons to use property they do not own is more compelling than the landowner's right to use its own property for the very purpose it exists. (See maj. opn., *ante,* at p. 23.) I would instead give *some* priority to the property's owner. The bankruptcy of the majority's position is shown by its further assertion that "[t]he Mall cites no authority, and we are aware of none, that holds

that a store has a compelling interest in prohibiting this traditiona. form of free speech." (Maj. opn., *ante,* at p. 24.) Good reason exists for this lack of authority. Because most of the country, including the United States Supreme Court, rejects the very notion of free speech rights on private property, *the issue never arises.* Only in California is the issue relevant. The only *tradition* that is relevant to this case is the tradition, followed in most of the country, of finding no free speech rights on private property. The majority is trampling on tradition, not following it.

I would find rule 5.6.2 valid even under *Pruneyard.*

III. Conclusion

I would answer the certified question the District of Columbia Circuit posed as follows: Under California law, Fashion Valley may maintain and enforce against the Union its rule 5.6.2. Additionally, I would overrule *Pruneyard, supra,* 23 Cal.3d 899. The time has come for this court to join the judicial mainstream.

Accordingly, I dissent.

CHIN, J.

WE CONCUR:

BAXTER, J.
CORRIGAN, J.

U.S. Court of Appeals for the
District of Columbia Circuit – No. 04-1411
S144753

IN THE SUPREME COURT OF CALIFORNIA

En Banc

FASHION VALLEY MALL, LLC, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent; GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432-M, Real Party in Interest.

(Filed Feb. 20, 2008)

The petition for rehearing is denied.

Baxter, Chin, and Corrigan, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice